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Supreme Court of the United States

OCTOBER TERM, 1941—NO. 908.

NEW YORK AND LONG BRANCH RAILROAD COMPANY,

Petitioner,

vs.

THOMAS M. FURY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of Said Court:

Your respondent respectfully shows:

I.

Summary Statement of the Matter Involved.

The statement of the matter involved as appears in petitioner's brief is substantially correct save for the fact that it should be noted that while respondent was awarded compensation in the New Jersey Workmen's Compensation Court, on the appeal to the Monmouth County Court of Common Pleas, the judgment was reversed on the ground that respondent was a trespasser and, therefore, not entitled to recover.

The question of whether or not respondent was engaged in interstate commerce was not considered in

the Monmouth County Court of Common Pleas; nor, was this question considered on the appeal to the New Jersey Supreme Court which reversed the Monmouth County Court of Common Pleas. The matter of respondent's being engaged in interstate commerce was considered for the first time during the appeals in the New Jersey Court of Errors & Appeals. Of course, this issue was urged in the New Jersey Workmen's Compensation Court. At this point it is significant to note that all thirteen members of the Court of Errors and Appeals, representing the entire personnel of that Court, qualified to sit in this case, concurred in the opinion announced. There was not a single dissenting vote.

The New Jersey Court of Errors & Appeals held, and we submit rightfully so, as follows:

> "The proofs utterly fail to support the claim that the Bureau (The New Jersey Workmen's Compensation Bureau) was without jurisdiction of the subject matter on the ground that appellant and respondent were engaged in interstate commerce at the time of the accident. Employer's Liability Act, 45 U. S. Cases, 51 *et seq.*—R. P. 214;"

and held further:

> "We are nonetheless satisfied that the proofs completely fail to meet the firmly fixed test of exclusive jurisdiction under the Federal Employer's Liability Act, *supra.*" R. P. 215.

The petitioner, New York and Long Branch Railroad Company, operates and is the owner of a railroad the confines and termini of which are undisputedly

within the State of New Jersey, running from Perth Amboy to Bayhead. Its tracks, roadbed and facilities are leased under an Operating Agreement (R. P. 128, *et seq.*) to the Pennsylvania Railroad Company and the Central Railroad Company of New Jersey; the latter two railroads being definitely engaged in interstate commerce. In short, under this Agreement, the New York and Long Branch Railroad Company, leases its property and services to the Central Railroad Company of New Jersey and the Pennsylvania Railroad Company.

II.

Argument.

POINT A.

The respondent was not engaged in interstate commerce at the time of his injury and therefore the Federal Employer's Liability Act of April 22, 1908, C. 149, 35 Stat. 65 (45 U. S. Code, Sec. 51 *et seq.*) does not apply.

The early case of *Shanks* v. *Delaware Lackawanna & Western Railroad Co.*, 239 U. S. 556, enunciated the doctrine which is applicable in the present case and which has been followed repeatedly by this Court. The facts in that case were that Shanks, an employee of the railroad which was engaged in both interstate and intrastate commerce, was engaged in working in the Company's machine shop, repairing locomotives used in such transportation. He was injured while engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fix-

ture—through which power was communicated to some of the machinery used in the repair work. The Court there stated:

> "The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the Act refers to the service being rendered when the injury was suffered * * * Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The Court held that Shanks was engaged in work too remote from interstate transportation to be practically a part of it and, therefore, was not employed in interstate commerce within the meaning of the Employers' Liability Act.

In the case of *Chicago, Burlington & Quincy Railroad Co.* v. *Harrington,* 241 U. S. 176, the employee was a member of a switching crew engaged at the time of his death, in switching coal belonging to the defendant to a coal shed where it was to be placed in bins and supplied as needed to locomotives, some of which were engaged in interstate traffic and others in intrastate traffic. The Court held that the employee was not engaged in interstate transportation in the taking of the coal to the coal chutes and refused to apply the Federal Employers' Liability Act.

In the case of *Bissett* v. *Lehigh Valley Railroad Co.,* 102 N. J. L. 283, affirmed 103 N. J. L. 172, the employee was employed on an engine used only for the

shifting of cars from one place to another in the Company yard, which car was detached from the other cars and taken to a track for repairs; and, while working upon the engine, he fell to the ground and sustained injuries resulting in death. The New Jersey Supreme Court refused to apply the Federal Employers' Liability Act, stating that the employee was not engaged in interstate commerce at the time of the accident. Application for Writ of Certiorari to review this case was made to this Court and denied. *Lehigh Valley Railroad Co.* v. *Bissett,* 273 U. S. 738.

In *Erie Railroad Co.* v. *Welsh,* 242 U. S. 303, the employee was performing miscellaneous services for his employer in the way of breaking and making up trains under orders of the yardmaster, and had to apply frequently to the latter for such orders. The employee, on the night of his accident, had been engaged with a yard crew in taking a freight car loaded with merchandise destined to a point outside the State and a caboose, to one of the yards where the freight car was placed upon a siding. He then returned in the caboose to the yardmaster's office for further orders and was injured while alighting from the caboose. The Court held at p. 307:

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

In *Lehigh Valley Railroad Co.* v. *Barlow,* 244 U. S. 182, the employee was a member of a switching crew and was assisting in placing three cars containing a

supply of coal for his employer, an interstate carrier, on an unloading trestle within its yards. These cars and their contents had passed over the employer's line from Sayre, Pennsylvania to New York. The cars remained upon sidings and switches and sometime thereafter were removed, at which time the employee was injured. The Court there held:

> "We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce."

An interesting comment by this Court is to be noted in the case of *Industrial Accident Commission of the State of California* v. *Davis,* 259 U. S. 182, p. 287, where it was stated:

> "Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, *at the time* of the injury, must be engaged in interstate *transportation* or in work so closely related to it as to be practically a part of it, in order to displace State jurisdiction and make applicable the Federal Act."

In the case of *Illinois Railroad Co.* v. *Behrens,* 233 U. S. 473, the Court stated:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged? * * *

> Here at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death, were not within the Statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the Statute, for by its terms, the true test is the nature of the work being done at the time of the injury."

In *Chicago & Northwestern Railroad Co.* v. *Bolle*, 284 U. S. 74, the employee was employed by an employer engaged in interstate and intrastate transportation. The employee was employed to fire a stationary engine used to generate steam to heat the passenger depot, baggage room and other structures used for general railroad purposes. The steam was also used to heat suburban passenger cars while standing in the yards. On the occasion in question, the stationary engine was out of order and employee had been making use of a locomotive engine as a substitute. He was directed to accompany this locomotive engine to a place about four miles distant to obtain a supply of coal. While coal was being taken on one of the locomotives, he was seriously injured. The Court in this case stated:

> "The sole object of the movement of the substitute engine was to procure a supply of coal for the purpose of generating steam. Its movement was in no way related to the contemplated employment of the other three locomotives in interstate transportation. * * *

> There is evidence that respondent at other times had been engaged in supplying other engines with coal and water, firing live engines, and turning a turntable; but his employment at the time of the injury was confined to firing the stationary locomotive for the sole purpose of producing steam. The character of the work which he did at other times therefore, becomes immaterial. * * *
>
> Having in mind the nature and usual course of the business to which the Act relates and the evident purpose of Congress in adopting the Act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion * * * and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

From the principles enunciated in the above cases, it is manifest that respondent, who had finished his day's labors and was on his way home, cannot be held to be employed in interstate commerce at the time of his injury and that being so, his case does not fall within the purview of the Federal Employer's Liability Act.

III.

POINT B.

Petitioner in this case occupies the position of a lessor railroad.

It is conceded that the New York & Long Branch Railroad Company owns the tracks and roadbeds, etc., extending from Perth Amboy to Bayhead, both points within the State of New Jersey.

The Operating Agreement, R. P. 128, is in effect a lease of this property to the Pennsylvania Railroad Co. and the Central Railroad Co. of New Jersey, as a result of which certain reciprocal advantages and obligations inure to all of the parties to it.

In *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, the employee was employed by an interstate carrier namely, the Southern Railway Co. This Company had leased the property of the defendant, an intrastate carrier, whose tracks, etc., were confined solely within the State of North Carolina. The employee was killed as a result of the alleged negligence of the lessor Company. His administrator recovered a judgment in a State Court in North Carolina, which judgment was thereafter affirmed by the State's highest tribunal. An appeal was then taken to the United States Supreme Court, which Court reversed the judgment heretofore obtained on the ground that the lessor Company was deemed to have been engaged in interstate commerce and, therefore, the State Court had no jurisdiction, and that the matter was properly within Federal jurisdiction. However, the significant feature is that this conclusion was

arrived at because of the fact that the local law of the State of North Carolina as laid down in *Logan* v. *North Carolina Railroad Co.*, 116 N. C. 940, 21 S. E. 959, held: that the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee injured through the negligence of the latter.

The writer knows of no local law of the State of New Jersey, which obligates the lessor railroad as in this case, the New York and Long Branch Railroad Company, to respond in damages for the negligent acts of its lessees. Conversely, therefore, the respondent in this case cannot be held to have been employed in interstate commerce.

POINT C.

Conclusion.

It is, therefore, respectfully submitted that the writ of certiorari applied for in this case be denied for the reason that this Court has no jurisdiction to attend the matter before it.

Respectfully submitted,

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